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SUPREME COURT, U.S.

NO. 80-964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

BARBARA NEWSOME, and
GLORIA FAYE NEWSOME — RESPONDENTS

* * * * * * * * * * *

The respondents, Barbara Newsome and Gloria Faye Newsome, ask leave to file the attached Respondents' Brief in Opposition to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The respondents were permitted to proceed as indigents by the Supreme Court of Kentucky. The respondents' affidavits in support of this motion are attached hereto.

Respectfully submitted,

ERWIN W. LEWIS
ASSISTANT PUBLIC ADVOCATE
COMMONWEALTH OF KENTUCKY
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FRANKFORT, KENTUCKY 40601

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Larry H. Marshall
COUNSEL FOR GLORIA FAYE NEWSOME

NO. 80-964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COMMONWEALTH OF KENTUCKY,

Petitioner,

vs.

BARBARA NEWSOME and
GLORIA FAYE NEWSOME,

Respondents.

AFFIDAVIT

I, Barbara Newsome, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs of fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I have been allowed to proceed in forma pauperis through all stages of my case.

Further the affiant saith not.

Barbara Gentches Newsome
BARBARA NEWSOME

Duly witnessed and sworn
to before me, a notary public,
this 9th day of Dec,
1981.

Hazel Perkins
Notary Public,
My Commission expires:

HAZEL PERKINS
Notary Public, Kentucky State at Large
My Commission Expires Feb. 22, 1982

NO. 80-964

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COMMONWEALTH OF KENTUCKY,

Petitioner,

vs.

BARBARA NEWSOME and
GLORIA FAYE NEWSOME,

Respondents.

AFFIDAVIT

I, Gloria Faye Newsome, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs of fees:

1. I am the petitioner in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I have been allowed to proceed in forma pauperis through all stages of my case.

Further the affiant saith not.

Gloria Faye Newsome
GLORIA FAYE NEWSOME

Duly witnessed and sworn
to before me, a notary public,
this 07 day of January,
1981.

Melton W. Hubbard
Notary Public, At Large State Ky.
My Commission expires: 09-05-84

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COMMONWEALTH OF KENTUCKY — PETITIONER

VS.

BARBARA NEWSOME, and
GLORIA FAYE NEWSOME — RESPONDENTS

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENTS' BRIEF IN OPPOSITION

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ASSISTANT PUBLIC ADVOCATE

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COUNSEL FOR GLORIA FAYE NEWSOME

JANUARY 12, 1981

QUESTION PRESENTED

WHETHER A JUVENILE HAS A DUE PROCESS RIGHT TO TESTIFY AND PRESENT EVIDENCE AT HER TRANSFER HEARING.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the Fourteenth Amendment and KRS 208.170(2) and KRS 208.170(3), the following constitutional and statutory sections are involved:

1) The Sixth Amendment to the United States Constitution, which reads in pertinent part: "In all criminal prosecutions the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

2) KRS 208.170(1), which reads in part: "If...it appears to the court that there is reasonable cause to believe that a child before the court has committed a felony, and at the time of the commission of the offense the child...was less than sixteen (16) years of age but the offense was a Class A felony or a capital offense...the court shall conduct a separate hearing to determine if the case should be transferred to the circuit court of the county in which the offense was committed."

3) KRS 507.020, which reads:

> (1) A person is guilty of murder when:
>
> (a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or

(b) Under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

(2) Murder is a capital offense.

4) KRS 507.030, which reads:

(1) A person is guilty of manslaughter in the first degree when:

(a) With intent to cause serious physical injury to another person, he causes the death of such person or of a third person; or

(b) With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of KRS 507.020.

(2) Manslaughter in the first degree is a Class B felony.

5) KRS 208F.010(2), which reads:

(2) If the Commonwealth sustains its burden of proving the existence of at least one (1) of the foregoing factors, the child shall be transferred to the circuit court to be tried as a youthful offender, except that the child may present to the court reasons why he should not be transferred to the circuit court.
eff. 7-1-82.

STATEMENT OF THE CASE

Respondents do not agree with the statement of the facts as related by the petitioner. A much more fair account of what occurred on August 23, 1976, can be found in the opinion of the Court of Appeals of Kentucky, which is part of petitioner's Appendix B, p. 25-30 (hereinafter designated PA).

More pertinent to the issue presented by petitioner is that which occurred at the Newsome girls' hearing to transfer jurisdiction from juvenile court to circuit court. This hearing was held on September 4, 1976.

Marcella Mullins was the first witness called by the Commonwealth. She testified that on the night of August 23 she, Mr. and Mrs. Sam Goodman, and Gerald McBrayer were sitting on her car listening to the C.B. when John Henry Newsome drove up (Transcript of the Transfer Hearing, hereinafter designated TTH 20-21). McBrayer walked to Newsome's car and shortly thereafter a fight broke out (TTH 21).

The two men fought for a time, after which Mullins "seen the Newsome girls downstairs with their knives" (TTH 22). They ran toward the McBrayer apartment, a door slammed, McBrayer ran toward his apartment" and then I seen him bring the girls out" (TTH 23). The fight between the men began again, and the Newsome girls "started stabbing and stabbing and stabbing" (Id.).

James Carter, Floyd County Coroner, testified that Gerald McBrayer died as a result of "multiple stab wounds in the chest, back and abdomen, with a hunting knife and butcher knife" (TTH 60).

Geraldine McBrayer, Gerald's wife, stated that on August 23 at around 9:30 "I didn't know that anything was happening. I had had my bath and I went to the door and I saw him lying on the ground and three of them were over top of him" (TTH 67). She ran and called the police, and while making the call, a girl she believed to be Barbara ran in and cut her (TTH 69).

After her testimony, the juvenile court held that "there is probable cause to believe that the defendants have committed the felony...Those are the prerequisites to our going into the next aspect of the transfer proceedings" (TTH 77).

Counsel for the girls objected, stating that he wanted to "make the record by avowal" (Id.). Counsel stated that he understood that "the proceeding is closed as to probable cause" (TTH 78).

The juvenile court clarified that his ruling on probable cause merely meant "probable cause insofar as the primafacie [sic] Commonwealth burden. That still leaves to you by calling them as witnesses" (TTH 78-79).

The Commonwealth then called Charles Daniel, a Juvenile Court Liason Specialist with the Department For Human Resources. He explained that Kentucky did not have a penitentiary for juveniles "which encompass a lock-and-key kind of situation" (TTH 82). The facilities available for juveniles were described as "reasonably secure from a standpoint of supervision and observation" (TTH 83). He agreed that there were juveniles in the facilities in his area who had been adjudicated guilty of class A crimes (TTH 86).

The juvenile court then ruled that there was probable cause to believe that a murder had been committed and that the Newsome girls had committed it. Further, he stated that he was denying "the defendants' motion to put on any and all testimony for purposes of this hearing and this hearing only" (TTH 91-92). The reason for this was that if the girls had put on any evidence, the hearing "takes on the character of an judicatory [sic] hearing...According to Breed, if the hearing does take on the character of an judicatory [sic] hearing, then jeopardy attaches, and a transfer, if justified is thereby concluded" (TTH 92).

The juvenile court went on to note that the denial of the right to introduce evidence was "only for the purposes of the nature and the character of this hearing...If the case is transferred or is not transferred, when it comes to the actual determination of guilt or innocence, the defendants will be allowed to introduce any and all relevant and competent evidence in their defense" (Id.).

Counsel for the girls then moved the juvenile court "to allow the introduction of any and all relevant evidence on their behalf, either in open court or by avowal so that a proper record for appeal can be preserved" (TTH 93). After the motion was overruled, counsel objected "to the entire proceeding relating to the transferred [sic] hearing because a full hearing has not been had and the accused have not been offered the opportunity to present anything at all in their own behalf" (TTH 94).

The next day, September 8, 1976, the juvenile court entered its order transferring the Newsome girls to Circuit Court. In that order, the juvenile court stated that it was considering evidence of the crime solely from the two Commonwealth witnesses, Marcella Mullins and Geraldine McBrayer (Transcript of the Record, hereinafter designated TR 26). It further stated that at the transfer hearing it had "refused to allow the defendants' testimony as to the events immediately before, during and after the alleged crimes" (TR 27). It noted further that "the defendants introduced other evidence by stipulation." This included evidence from a school teacher, a guidance counselor, and an uncle (TR 28). Finally, the juvenile court noted that there was probable cause to believe the girls had committed a Class A felony (TR 29).

The Newsome girls were indicted for murder on September 9, 1976 (TR 2). Their trial took place in February of 1977. Prior to trial, counsel again objected to the exclusion of evidence at their transfer hearing, stating that:

> had the defendants testify [sic] together with any witnesses that might have been subpoenaed for them, it would have showed that they acted under duress; not only did they act under duress but they believed that they were only doing that which was responsible or what they should do to protect their father who was about to be and was assaulted and that the deceased was the aggressor and brought it about, and without their defense being offered in that Court this transfer should never have been effected... (TE 35).

The girls were tried on February 14, 1977. They were convicted of first degree manslaughter and were sentenced to fifteen (15) years in prison by the jury (TE 784). The trial court, however, committed them to the Department For Human Resources, rather than the Bureau of Corrections (TR 53-55).

The Newsomes appealed their convictions to the Kentucky Court of Appeals. The primary issue they raised was the failure of the juvenile court to allow them to testify at their transfer hearing.

On May 11, 1979, the Kentucky Court of Appeals held that "at a transfer hearing held pursuant to KRS 208.170, the accused child has not only the right to hear the evidence and cross-examine the witnesses, but also the right to present evidence and to be heard" (PA 41). The Court also stated that it knew "of no other instances where due process is an element of a hearing that only one side of the evidence may be presented, and that the very individual whose rights, welfare, and interests are at stake finds herself muzzled and silenced, and forced to sit mute while evidence and orders are meted out" (PA 39). This holding was based upon the rights to counsel, to be heard, to present a defense, and generally to due process of law.

Not content with this holding, the Commonwealth sought review of this decision before the Kentucky Supreme Court. While that Court granted review, they affirmed the lower court in an unpublished opinion, stating that, "A hearing in which the accused is deprived of the right to speak in his or her own behalf cannot be adjudged 'fair.' Nor can it be said that the juvenile court, in issuing the order, was acting 'in the best interest of the child,' and prescribed by KRS 208.170(3), when it lacked what could constitute highly pertinent information about the crime and the accused" (PA 20).

SUMMARY OF REASONS FOR DENYING THE WRIT

I.

The Kentucky Supreme Court based its decision substantially upon an interpretation of KRS 208.170(3), holding that a juvenile judge should hear evidence from the juvenile in order to decide what is in the best interests of the child and society. The decision thus rests upon an adequate state ground, and review by this Court is not warranted.

II.

The decision by the Kentucky Supreme Court that a child has a right to testify and present evidence at her transfer hearing as a matter of due process and fair treatment is consistent with past decisions by this Court.

III.

Petitioner has not stated as a reason for granting the writ the inconsistency of the decision below with decisions of other state courts of last resort. There are a number of state court decisions with which the decision below is consistent. This creates no reason for this Court to exercise its jurisdiction in this case.

IV.

The decision below is unpublished. Further, the Kentucky transfer statute has been replaced by a new juvenile code, which takes effect on July 1, 1982, which appears to allow children to present evidence at their transfer hearing. These two facts limit the impact of the decision below to the two respondents, rendering unnecessary the exercise of jurisdiction by this Court.

REASONS FOR DENYING THE WRIT

I.

THE OPINION BELOW IS BASED SUBSTANTIALLY UPON AN INTERPRETATION OF THE KENTUCKY JUVENILE STATUTE, CONSTITUTING AN ADEQUATE STATE GROUND JUSTIFYING THE DENIAL OF JURISDICTION BY THIS COURT.

On appeal before the Kentucky appellate courts, respondents urged that their testimony was relevant not only to the question of whether they had committed a Class A felony, but also whether it was in their best interest to be tried as adults. While petitioner has from the beginning of this litigation attempted to limit this case only to the probable cause question, both appellate courts included the best interests issue in their opinions.

Significantly, the Kentucky Supreme Court clearly did not reserve its holding to the fact that a child has a right to testify as a matter of fundamental fairness under the due process clause of the Fourteenth Amendment at the probable cause phase of the transfer hearing. The Court also explicitly held that under KRS 208.170(3), a juvenile court needs to hear evidence from the child.

> Nor can it be said that the juvenile court, in issuing the order, was acting "in the best interest of the child," as prescribed by KRS 208.170(3), when it lacked what could constitute highly pertinent information about the crime and the accused. (PA 20).

It is important to observe that this second holding of the Kentucky Supreme Court relies in its entirety upon KRS 208.170(3). That Court is holding that a juvenile court, under KRS 208.170(3), in order to make a proper determination of the best interests of the child and society, must hear evidence from the child if offered. There is no reliance upon the due process clause in this part of the Court's holding.

Respondents submit that the opinion below, therefore, rests in substantial part upon the Kentucky Supreme Court's interpretation of KRS 208.170(3). This Court has consistently "adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." Herb v. Pitcairn, 324 U.S. 117, 126 (1945); Henry v. State of Mississippi, 379 U.S. 443, 446 (1965). Because the decision of the Kentucky Supreme Court rests in substantial part upon its interpretation of the state juvenile statute, this Court should not grant this petition for a writ of certiorari.

II.

THE OPINION BELOW IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT.

Petitioner wants this Court to review the decision of the Kentucky Supreme Court for the reason that the lower court "misconstrued and misapplied McKeiver v. Pennsylvania, supra, and In re Gault, supra, to the probable cause phase of a juvenile transfer hearing in Kentucky." Significantly, however, petitioner points to no language in either decision with which the Kentucky Supreme Court holding can be deemed to be inconsistent. Thus, petitioner is asserting no ground for which this Court should exercise its limited jurisdiction.

Furthermore, the decision of the Kentucky Supreme Court is quite consistent with the pronouncements of this Court

regarding state procedures in juvenile courts. In Kent v. United States, 383 U.S. 541, 562 (1966), this Court held that a transfer hearing "must measure up to the essentials of due process and fair treatment." Fair treatment, in that context, meant that a hearing must be held where the child is represented by counsel who is able to advocate for that child.

In re Gault, 387 U.S. 1 (1967) used this same standard in the context of a juvenile adjudicatory hearing, holding that due process and fair treatment required timely notice of the charges, the attachment of counsel, the opportunity to confront and cross-examine accusers, and the privilege against self-incrimination.

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) reaffirmed the applicability of the due process and fair treatment standard, while holding that a jury trial was not required in an adjudicatory hearing.

These cases all stand for the proposition that due process and fair treatment are the touchstones for judging procedures established in the juvenile courts of the states. The Kentucky Supreme Court held that the juvenile court in the instant case violated that standard when it refused to allow the Newsome girls to take the stand at their transfer hearing.

Respondents submit that this holding, rather than misconstruing prior decisions of this Court, in fact, affirms the spirit of those decisions. Holding that a child be allowed to take the stand allows the child to controvert that which the state is trying to do to him or her. In the present case, for example, had Barbara and Gloria Newsome been allowed to testify, they could have shown that they could not be transferred because their crime was a Class B as opposed to a Class A felony.[1] Basic fairness demands that a child be allowed to counter that which is being alleged by the Commonwealth.

---

[1]Under KRS 208.170(1), a child under the age of sixteen (16) can only be transferred if there is probable cause to believe that she has committed a Class A felony. In the context of the present case, only if the Newsomes committed murder (KRS 507.020) rather than first degree manslaughter (KRS 507.030) could they be tried as adults. The major distinction between murder and first degree manslaughter is the presence of

Basic fairness would also allow that a child should have a right to be heard before a precious right, the right to be treated as a child, is taken from her. In re Oliver, 333 U.S. 257 (1947). It would allow a child to have her counsel do more than cross-examine witnesses; that counsel could affirmatively assert a defense, present witnesses, and present the testimony of the child herself. All of these comport with basic fundamental fairness. None misconstrues this Court's prior decisions. Accordingly, there is no reason for this Court to grant this petition for the writ of certiorari.

III.

THE OPINION BELOW IS CONSISTENT WITH PRIOR DECISIONS OF STATE COURTS OF LAST RESORT.

The decision of the Kentucky Supreme Court allowing a child to present evidence at her transfer hearing is consistent with a number of decisions of other state courts of last resort. State v. Womack, Tenn.App., 591 S.W.2d 437, 444 (1979); D.H. v. State, 76 Wis.2d 286, 251 N.W.2d 196, 202 (1977); McKeever v. State, Okl.Cr., 565 P.2d 703, 705 (1977); Summers v. State, Ind., 230 N.E.2d 320, 325 (1967). In contrast, petitioner has not alleged the inconsistency of the opinion below with any other state court's decision as a reason to grant the writ. In this posture, it is apparent that this issue is not one which is interpreted in many different ways by the state courts, thereby giving another indication that a petition for the writ of certiorari is not appropriate in this case.

---

1 cont'd.

extreme emotional disturbance in the latter. Evidence of extreme emotional disturbance was presented to the jury by the Newsome girls at their trial, and they were convicted of first degree manslaughter rather than murder. This same evidence was not presented to the juvenile court, and the juvenile court thereby found that there was probable cause to believe that murder had been committed, having heard no evidence, purposefully, of first degree manslaughter.

IV.

THE OPINION BELOW WILL HAVE LITTLE OR NO IMPACT IN KENTUCKY BECAUSE THE OPINION IS UNPUBLISHED AND BECAUSE A NEW JUVENILE CODE WILL TAKE EFFECT ON JULY 1, 1982.

Petitioner states that "[t]he juvenile has not in the past been given the right as a matter of law to present witnesses or to testify in her own behalf..." (Petition, p. 10). This past tradition has been changed, according to the petitioner, by the decision in the present case.

> We submit that a "mini-trial" type situation will arise in nearly every juvenile waiver case which will be time-consuming since there appears to be no limitation on discovery procedures or other evidence which may be brought forth by the juvenile. (Petition, p. 14).

The writ should therefore be granted, again according to petitioner, due to the dramatic change being wrought upon the Kentucky juvenile justice system by this decision of the Kentucky Supreme Court.

There are a number of things wrong with this, which again indicates no justifiable reason to review the decision below. First of all, respondents disagree with the assertion that in the past children have not been allowed to present evidence at their transfer hearings. No case, statute, study, or report is cited to support petitioner's description of past juvenile practice in Kentucky. Indeed, it is probable that there are no decisions on point in Kentucky because children have rarely been denied the opportunity to testify and present evidence at their transfer hearings.

Secondly, the decision of the Kentucky Supreme Court in this case is not to be published. Thus, the dread impact of this opinion on the Kentucky juvenile system predicted by petitioner is fanciful. See Kentucky Rule of Civil Procedure 76.28(4)(c).

Finally, the 1980 Kentucky legislature recently rewrote the entire juvenile code in Kentucky, to take effect on July 1, 1982. One of the new provisions is KRS 208F.010(2),

which provides that in a hearing held to decide if a child will be classified as a "youthful offender" and tried as an adult, he or she will be able to "present to the court reasons why he should not be transferred to the circuit court." While obviously this language is yet to be interpreted, respondents submit that the legislature has codified that which the Kentucky Supreme Court held in its opinion below. Petitioner's fear of the impact of that decision on the juvenile justice system in Kentucky is therefore highly misplaced in light of a new statutory provision which will accomplish the same thing.

CONCLUSION

The Kentucky Supreme Court's decision holding that a child has a right to testify and present evidence at her transfer hearing is not only a sound decision interpreting a state statute but is also a decision that is consistent with past opinions of this Court and other state courts of last resort. Further, in light of the fact that a new juvenile code has been passed in Kentucky and that the opinion below is not to be published, the decision of the Kentucky Supreme Court will have little impact on anyone other than Barbara and Gloria Faye Newsome. For these reasons, this Court should deny the petition for a writ of certiorari to the Kentucky Supreme Court.

Respectfully submitted,

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